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No. 07-1421

IN THE

Supreme Court of the United States

CANON LATIN AMERICA, INC.,

Petitioner,

v.

LANTECH (C.R.), S.A.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Every circuit agrees that the threshold requirement for an international anti-suit injunction is that the domestic suit and the foreign action involve the same parties and the same issues.

The question presented is whether the Eleventh Circuit properly found that a Costa Rican suit was not parallel to a domestic suit where: (a) the Costa Rican suit was based upon Costa Rican statutory rights with a mandatory jurisdictional provision that cannot be contractually waived under Costa Rican law; (b) those statutory rights are not at issue in the domestic suit; (c) the breach of contract claim in the U.S. was not at issue in Costa Rica; (d) the Costa Rican suit does not interfere with the domestic suit; and (e) the forum selection clause at issue was found to be unenforceable by the Costa Rican courts, both at the trial and appellate levels.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

No parent or publicly held company owns 10 percent or more of the stock in Respondent Lantech (C.R.), S.A.

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Petitioner concedes that the circuits speak with one voice on the "threshold standard" for the issuance of a foreign anti-suit injunction. Therefore, the Petition does not present any legal issue of uncertainty for this Court to clarify. At best, it asserts a "misapplication of a properly stated rule of law," S. Ct. R. 10, which does not warrant this Court's intervention. Yet even the misapplication point is illusory, as any differences between the First, Ninth, and Eleventh Circuits can be traced to the contrasting factual scenarios facing those courts. This Court does not need to delve into such factual squabbles, nor does it need to devote time to comparing the Ecuadorian statutory and procedural regime at issue in the Ninth Circuit with the Costa Rican framework presented in this case.

Petitioner freely admitted below that the proceedings in the district court "ha[d] nothing to do with the substantive content of Costa Rican Law No. 6209," which was the subject of the Costa Rican action. In any circuit, such a concession is fatal to an anti-suit injunction. Recognizing that, Petitioner seeks to distract attention by pointing to a forum selection clause. Yet the Costa Rican trial and appellate courts both struck that clause as unenforceable because it violated Costa Rican statutory law. In this country as well, courts regularly recognize that forum selection clauses must yield to public policies embodied in statutes. This is not a departure from this Court's precedent on forum selection clauses, but rather a faithful application of it. In any event, the existence of a forum selection clause does not excuse Petitioner's need to satisfy the threshold criteria for a foreign anti-suit injunction. Petitioner simply fails to identify any split of authority or other compelling reason necessitating this Court's review.

Finally, this case is a poor vehicle for certiorari. Because the Eleventh Circuit found the failure to satisfy one of the threshold criteria dispositive, it did not engage in the remainder of the analysis. As Respondent argued below, Petitioner cannot prevail on any of those other criteria, which means that the outcome of the case would not change regardless of the questions framed in the Petition, and the posture of the case could even obviate the Court's need to actually answer those questions. This case also turns on factual issues (such as a comparison of the Costa Rican action to the domestic proceeding) and an evaluation of Costa Rican law (some of which is now in flux). Such matters do not beckon this Court's scrutiny.

STATEMENT OF THE CASE

This case arises from the relationship between Petitioner Canon Latin America, Inc. ("Canonlat"), a supplier based in the United States and doing business in Costa Rica, and Respondent Lantech (C.R.), S.A. ("Lantech"), a Costa Rican corporation that served as the exclusive distributor for Canon brand photocopiers and related services in Costa Rica from 1976 until 2004. In 2004, Canonlat severed the exclusive distributorship by appointing SB Technology (C.R.), S.A. ("SB Technology") as an alternative distributor. Such a maneuver permitted SB Technology to take advantage of the investments in brand loyalty generated by Lantech over the previous decades. Canonlat's decision sounded the death knell for Lantech's business; it no longer conducts business operations. Lantech accordingly initiated an action for damages in Costa Rica based on the Costa Rican "Law for the Protection of Foreign Company Representatives" ("Law 6209") against both Canonlat and SB Technology.

Law 6209 protects Costa Rican distributors from a variety of acts by a foreign company, including unilateral termination of an exclusive distributorship. *See* Art. 4(e); Pet. at 2-3. Article 7 of that law contains an express jurisdictional limitation and anti-waiver clause: "The jurisdiction of the

Costa Rican courts of justice and the rights of the representative, distributor or manufacturer, by virtue of this law, cannot be waived." Article 6 makes a new distributor (such as SB Technology) liable for damages in some circumstances. Law 6209 protects Costa Rican distributors when a foreign supplier tries to undercut a local distributor that has invested time and resources in building brand recognition and loyalty. Accordingly, Law 6209 makes jurisdiction and liability dependent only on the parties' actual relationship, and independent of any contract signed by the distributor.

As part of the Costa Rican action, Lantech asked that Canonlat be required to post an indemnity bond pursuant to Article 9 of Law 6209. The Costa Rican court ordered Canonlat to post a guarantee for roughly one-sixth of the claimed damages, or one million dollars, to ensure that Canonlat would abide by its orders. Article 9 requires courts to impose a bond sufficient to guarantee that the local distributor will be paid in full should it succeed, giving courts discretion to require a bond equal to the entirety of claimed damages.

Relying on a choice of forum clause favoring Florida in its standard form contract, Canonlat moved to dismiss Lantech's Costa Rican action for lack of jurisdiction. It also initiated the present action in the Southern District of Florida to enjoin the Costa Rican suit. In the domestic action, Canonlat claimed: (1) a declaratory judgment on the enforceability of the forum selection clause; (2) a breach of contract (for non-payment of certain goods); and (3) relief under various quasi-contract theories. As Canonlat later conceded, these claims "ha[ve] nothing to do with the substantive content of Costa Rican Law No. 6209," under which Lantech brought its Costa Rican suit. Dist. Ct. Doc.

240 at 1.[1] Lantech ultimately agreed to a judgment on the breach of contract claim, which the court entered, and the parties stipulated to a dismissal of the quasi-contract counts, leaving only the declaratory judgment claim and the request for an anti-suit injunction. Pet. App. at 5a n.4. No party maintained that the resolution of the contractual counts had any effect on Lantech's claims under Law 6209.

Meanwhile, the Costa Rican court denied Canonlat's motion to dismiss, concluding that the contractual forum selection clause

> is of no effect, since a public policy law such as 6209 specifies that the jurisdiction of the courts of this country cannot be waived in this type of dispute.

Pet. App. at 5a n.3. Canonlat appealed this decision to a Costa Rican appellate court. A three-judge panel affirmed, holding that the forum selection clause was unenforceable because the protections of Law 6209 are unwaivable. Dist. Ct. Doc. 250, Ex. B, at 9 ("It is clear and obvious that the remission to the State of Florida jurisdiction violates the provisions of article 7 of Law 6209."). The case was remanded for proceedings on the merits.

Having lost in Costa Rica, Canonlat renewed its efforts to obtain an international anti-suit injunction to stop the Costa Rican court from reaching a judgment on the merits following the remand from the Costa Rican appellate court.

The district court obliged, issuing the requested anti-suit injunction. It held that Lantech's exercise of its rights under Costa Rican law "frustrates the policy of this Court of enforcing [forum selection clauses]" and that the bond

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[1] Filings in the district court case, *Canon Latin America, Inc. v. Lantech (CR), S.A.*, Case No. 05-20297-Civ-Brown (S.D. Fla.), are available on PACER at https://ecf.flsd.uscourts.gov/cgi-bin/login.pl. References in this Opposition to district court filings will be by docket entry number.

provision of Law 6209 was "vexatious." Pet. App. at 28a. The court acknowledged that neither party had asserted a claim based on Law 6209 in that action, and that the only relief sought was to block the Costa Rican suit. It also held that the action before it was *not* dispositive of the Costa Rican action. *Id.* at 31a n.12. But it nevertheless concluded that the issues were sufficiently similar to support issuance of the injunction. *Id.* at 27a, 30a-31a. Despite the recent decisions in Costa Rica reinforcing the importance of Law 6209 and its anti-waiver protections, the district court determined that enforcing Law 6209 was not the public policy of Costa Rica because of the pendency of the Central American Free Trade Agreement ("CAFTA"). Pet. App. at 25a.

Lantech appealed the district court's decision. In a *per curiam* opinion, the Eleventh Circuit applied the "threshold requirements" that "a district court may issue an anti-suit injunction only if: (1) the parties are the same in both the foreign and domestic lawsuits, and (2) resolution of the case before the enjoining court is dispositive of the action to be enjoined." Pet. App. at 7a-8a (internal quotation marks and brackets omitted). The Eleventh Circuit concluded that the second of these requirements was not satisfied because "Lantech's Costa Rican action hinges on statutory rights that are unique to Costa Rica and that cannot be resolved by a judgment of the district court on Canonlat's claims in Florida." *Id.* at 9a-11a. Thus, the court vacated the anti-suit injunction without reaching the identity of the parties, the validity and enforceability of the forum selection clause, or any other issue. *Id.* at 11a & n.10.

REASONS FOR DENYING THE PETITION

I. This Case Does Not Present a Disagreement Between the Circuits.

A. Every Circuit Agrees on the Threshold Factors For an International Anti-Suit Injunction.

Every circuit applies the same threshold factors before granting an anti-suit injunction. As admitted by Canonlat:

> The initial test, as defined by *each of these circuits*, requires that the enjoining court determine, first, whether the parties and the claims in both the foreign and domestic litigation are the same, and second, whether the action before the enjoining court is dispositive of the action to be enjoined.

Pet. at 4 (emphasis added). Though stated slightly differently from case to case, these threshold factors are well-established in every circuit. *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 34, 36 (2d Cir. 1987) (the "threshold requirements" are "(1) the parties must be the same in both matters, and (2) resolution of the case before the enjoining court must be dispositive of the action to be enjoined"); *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 991 (9th Cir. 2006) (the threshold step is "to determine 'whether or not the parties and the issues are the same, and whether or not the first action is dispositive of the action to be enjoined'"); *Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 18 (1st Cir. 2004) ("The gatekeeping inquiry is, of course, whether parallel suits involve the same parties and issues."); *Philips Medical Sys. Int'l B.V. v. Bruetman*, 8 F.3d 600, 605 (7th Cir. 1993) (noting that courts require, at a minimum, "a duplication of the parties and the issues"); *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 928 (D.C. Cir. 1984) (same); *Gau Shan Co. v. Bankers Trust Co.*, 956 F.2d 1349,

1353 (6th Cir. 1992) (same); *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods. N.V.*, 310 F.3d 118, 127 (3d Cir. 2002) (a finding of a "duplication of issues" is the beginning of the inquiry). Therefore, although they may differ on the balance of the anti-suit injunction analysis (matters that the Eleventh Circuit did not address), the circuits have reached unanimity on the threshold criteria.[2]

Not surprisingly, therefore, the Eleventh Circuit's opinion employs the same language as the First, Second, and Ninth Circuits to describe the threshold factors. Pet. App. at 7a-8a, 10a-11a. Indeed, the Eleventh Circuit adopted verbatim the Ninth Circuit's formulation of the factors in *Gallo*. *Id.* at 10a-11a ("[T]he standard . . . is 'whether or not the first action is *dispositive* of the action to be enjoined.' *Gallo*, 446 F.3d at 991."). And *Gallo*, in turn, borrowed from the First Circuit's decision in *Quaak*. *Gallo*, 446 F.3d at 991. The decision below was thus only the latest in a series of cases recognizing the settled threshold standard for anti-suit injunctions; it did not "add" to any "conflict between the Ninth and First Circuits." Pet. at 10 (emphasis omitted). An analysis of the facts of each case reveals that any differences between these cases only reflect these disparate factual settings – not any disagreement on the governing standard.

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[2] Canonlat concedes that the Eleventh Circuit's decision does not implicate the split that exists on the remaining factors for an anti-suit injunction. Pet. at 5 n.2 ("This is distinguished from the conflict which currently exists among the circuits . . . [which] is the subject of a pending petition for writ of certiorari in the case of *Goss Int'l Corp. v. Tokyo Kikai Seisakusho et al.*, Docket No. 07-618."). As Canonlat explains, "because the Eleventh Circuit in this case resolved the case on the question of the threshold test, it never reached the issue of which of the applicable legal standards applied." *Id.*

B. The Eleventh Circuit's Decision Comports With *Quaak* and *Gallo*.

Because the Eleventh Circuit adopted (and quoted) the Ninth Circuit's standard on the threshold criteria, the Petition astutely avoids revealing to the Court the precise rule of law that Petitioners would invite this Court to adopt. This is an implicit recognition that any difference between the cases, real or imagined, must come from the application of settled law to specific facts—such as the weight given to foreign statutory law (or to decisions of foreign tribunals) in deciding whether two cases are parallel. Individual courts may weigh the facts of each case differently, but that does not create a circuit split. At best, this case presents a question of "the misapplication of a properly stated rule of law," which does not justify certiorari.[3] S. Ct. R. 10. Accepting certiorari will only mire this Court in sifting through (and weighing) factual matters and the idiosyncrasies of Costa Rican, and perhaps Ecuadorian, law.

1. The Ninth Circuit's decision in *Gallo* applied the basic principles later adopted by the Eleventh Circuit to facts that were the opposite of this case. Its decision on the threshold factors was based on the key factual finding that "[i]n the Ecuadorian court, Andina sued for breach of contract." *Gallo*, 446 F.3d at 991. Because the Ninth Circuit found that the very same contractual claims were before the district court, it found that the threshold factor was met. *Id.* ("[A]ll the issues before the court in the Ecuador action are before the court in the California action. . . . the parties and claims are the same.").

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[3] The footnote in the Eleventh Circuit's opinion that appears to be the foundation of the Petition, (Pet. App. at 8a n.8) confirms this point by emphasizing that the "requirement" is the same everywhere, but some courts might be more "strict[]" in application than others.

Canonlat insists, however, that Andina actually had a statutory (not contractual) claim akin to Lantech's. Yet the Ninth Circuit clearly stated that Andina's only claim in Ecuador was contractual. *Id.* The statute on which Andina had originally based its claims was imposed by a military dictatorship and "had been repealed" seven years earlier. *Id.* at 987-88 ("Andina sued under the Decree in spite of its revocation several years before."). Moreover, Ecuador's own courts had dismissed (and affirmed the dismissal of) Andina's claims. *Id.* As a result, the Ninth Circuit found that the only viable claim in the Ecuadorian courts was for a breach of contract – the same claim pending in the U.S. Not only that, but the Ecuadorian court explicitly held that "the forum selection clause was valid and that the claim should be heard in California." *Id.* at 988.

2. In contrast to the facts in *Gallo*, the Eleventh Circuit recognized that: (1) the Costa Rican courts had held the forum selection clause unenforceable based on the statute's mandate that Law 6209 claims could not be contractually waived; (2) Law 6209 was a valid law, as recognized by the Costa Rican judiciary; (3) the breach of contract claim pending in the U.S. was not at issue in Costa Rica; and (4) no Law 6209 claim – the subject of the Costa Rican action – was brought in the U.S. It is little wonder, based on these facts, that the outcome differed between *Gallo* and this case.

Indeed, Canonlat effectively conceded the point below: "This case . . . has nothing to do with the substantive content of Costa Rican Law No. 6209." Dist. Ct. Doc. 240 at 1. And it echoed this by framing the question presented as a situation "where the claims raised in the action to be enjoined are not identical to those pending before the enjoining court." Pet. at ii. If the Costa Rican statutory claim "has nothing to do" with and is "not identical" to the domestic action, how does Canonlat prevail under the Ninth Circuit's standard that the domestic action be "dispositive" of the foreign proceeding? The Eleventh Circuit rightly held that the independent statutory claim was nothing like Canonlat's claim of

nonpayment for certain goods. Pet. App. at 9a ("Lantech's Costa Rican action hinges on statutory rights that are unique to Costa Rica and that cannot be resolved by a judgment of the district court on Canonlat's claims in Florida."). And the Eleventh Circuit gave Canonlat the benefit of the Ninth Circuit's standard, quoting it word for word. Pet. App. 10a-11a.

3. Canonlat's reliance on *Quaak* to evidence a split is even more perplexing in light of its confession that it is not sure what *Quaak* means. Pet. at 16 ("the First Circuit in *Quaak* did not expand on the meaning of 'substantially similar'"). *Quaak* is just another application of the same standards to different facts. There, the defendant in a U.S. bankruptcy case fled to Belgium to obtain an order halting discovery before the U.S. court. *Quaak*, 361 F.3d at 14, 20. The U.S. court responded with an anti-suit injunction. Rather than "belabor the obvious," the First Circuit disposed of the threshold factors in short order. *Id.* at 20. The Belgian suit was not merely parallel—it was interdictory. The issue before each court was which would retain jurisdiction over the action.

Quaak does not conflict with *Gallo* or the Eleventh Circuit's opinion, and Canonlat searches in vain for any difference between the approaches. Unsure about how to characterize *Quaak* to its advantage, Canonlat suggests that it "is *likely* more akin" to *Gallo* than to the decision below. *Id.* at 17 (emphasis added). As each court relied upon the other, it would be more accurate to say that the holdings in *Quaak*, *Gallo*, and the court below were all "akin." Of course, since Canonlat does not have a precise legal framework for this Court to adopt, it is simply at a loss for what it should do with *Quaak*. It eventually attempts to contrast *Quaak* with the "strict identity requirement" allegedly applied by the Eleventh Circuit. Pet. at 16-17. But in no sense can the Eleventh Circuit be considered to have imposed a "strict identity requirement" when Canonlat admitted that the domestic action had "nothing to do" with Law 6209.

II. The Threshold Factors, Accepted by Every Circuit, Are Not in Conflict With Other Lines of Cases on Forum Selection Clauses.

Canonlat argues that because the Eleventh Circuit had "no reasoned basis" for refusing to enforce the forum selection clause, it violated this Court's general jurisprudence on forum selection clauses in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), among others. Pet. at 20-21. Yet none of those cases addresses when it is appropriate to issue an anti-suit injunction to halt foreign proceedings. Since they do not implicate the issue decided by the Eleventh Circuit, it strains credulity for Canonlat to proclaim a conflict.

A. There Is No Conflict Between the Eleventh Circuit's Decision and *Bremen* or *Scherk*.

1. The Eleventh Circuit applied the threshold factors for a foreign anti-suit injunction in accordance with decades of settled precedent. Even in *Gallo*, where the Ecuadorian court had already upheld the validity of the forum selection clause, the Ninth Circuit diligently applied each of the threshold factors before turning to the issue of a forum selection clause. *Gallo*, 446 F.3d at 991-92 (addressing threshold factors before considering forum selection clause). Enjoining a foreign court applying its sovereign law is a very different question from dismissing a domestic suit based on a domestic policy in favor of forum selection clauses.

Moreover, the forum selection clause was already held to be *unenforceable* in the proceedings in Costa Rica. Canonlat moved to dismiss the Costa Rican action for lack of jurisdiction based on the forum selection clause. The Costa Rican trial court denied the motion, holding that Law 6209 "specifies that the jurisdiction of the courts of this country cannot be waived." Dist. Ct. Doc. 250, Ex. A, at 14. Canonlat appealed, and a three-judge appellate panel affirmed Dist. Ct. Doc. 250, Ex. B, at 9-10. The Eleventh Circuit

rightly rejected Canonlat's attempts to overturn these judgments without a showing that the threshold factors were met.

The district court cases that Canonlat cites as supposedly in tension with the Eleventh Circuit actually support that decision because they all apply the threshold factors before considering the effect of a forum selection clause. *See Int'l Equity Invs., Inc. v. Opportunity Equity Partners Ltd.*, 441 F. Supp. 2d 552, 563 (S.D.N.Y. 2006) ("Having met the threshold anti-suit injunction requirements. . . ."); *Farrell Lines v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118, 130 (S.D.N.Y. 1997) ("Here, plaintiff meets the two threshold requirements."); *Int'l Fashion Prods. v. Calvin Klein, Inc.*, 1995 U.S. Dist. Lexis 2598, at *5 (S.D.N.Y. Mar. 7, 1995) ("Comparing IFP's pleadings in both actions, it is clear that both of these requirements are met."); *Suchodolski Assocs., Inc. v. Cardell Fin. Corp.*, 2006 U.S. Dist. Lexis 83169, *4-6 (S.D.N.Y. Nov. 16, 2006) ("In this action, the same Auction claim is at issue in both of the parallel proceedings.").[4] None of these cases rely on the general presumption in favor of forum selection clauses to obviate the need to consider the basic criteria of a foreign anti-suit injunction. Nor do they involve foreign statutes with express anti-waiver provisions.

Implicitly, Canonlat appears to be arguing that a forum selection clause is all that one needs to secure a foreign anti-suit injunction. There is a reason why Canonlat does not make this explicit. No court has ever accepted such a theory that a forum selection clause automatically trumps all contrary foreign laws, rulings of foreign courts, and every other consideration. Such a holding would contravene the teaching of *Bremen*: "We cannot have trade and commerce in

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[4] *Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 99 (2d Cir. 1999), involved arbitration and there is no arbitration agreement at issue here.

world markets . . . exclusively on our terms, governed by our laws, and resolved in our courts." *Bremen*, 407 U.S. at 9; *Scherk*, 417 U.S. at 519. Allowing Canonlat to enjoin the proceeding in Costa Rica under the same forum selection clause that its courts previously found unenforceable as contrary to Costa Rican statutory policy would signal that American companies are free to operate in Costa Rica unconstrained by its laws.

Once the threshold factors are met, courts may consider a forum selection clause in conjunction with the remaining anti-suit injunction analysis. *See, e.g.*, *Gallo*, 446 F.3d at 991. That would, of course, depend on the individual facts and circumstances of each case.

2. Canonlat also pretends that the Eleventh Circuit's decision conflicts with five securities cases from other circuits involving forum selection clauses. Pet. at 18. There is an easy response to these cases, all of which arise out of litigation relating to Lloyd's of London. First, none of those cases involved an anti-suit injunction, or anything like it, much less had occasion to opine on the threshold factors. Second, the Eleventh Circuit is in lockstep with this authority. *See Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285 (11th Cir. 1998). Indeed, *Lipcon* notes that the circuits are unified on the questions at issue in those cases. *Id.* at 1291. Canonlat cited *Lipcon* below to the Eleventh Circuit, and the court found no inconsistency between that holding and the result in the matter at hand.

B. It Is Well-Settled That Public Policy, Especially Public Policy Expressed in a Statute, Can Trump Forum Selection Clauses.

Although the petition warns that the decision below "threatens to render" forum selection clauses "all but irrelevant," Pet. at 5, 22-23, it is no different from many other decisions enforcing statutory limitations on forum selection clauses. The sky did not fall after any of them.

In light of Canonlat's inability to satisfy the threshold test for an anti-suit injunction, the Eleventh Circuit had no need to examine Costa Rica's statutory limitations on forum selection clauses. But if it had vacated the injunction on that ground, it would have been in good company. *Bremen* itself recognizes that forum selection clauses may not be enforced if "enforcement would be unreasonable and unjust," or if "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Bremen*, 407 U.S. at 15. Many states have acted in reliance on *Bremen*'s public policy exception, enacting statutes that make forum selection clauses unenforceable in a variety of circumstances.

Some states go so far as to make exclusive forum selection clauses *per se* unenforceable. MONT. CODE ANN. § 28-2-708 (2007) ("Every stipulation . . . in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals . . . is void."); IDAHO CODE § 29-110(2) (2008); *Schenck v. Motorcycle Accessory Warehouse, Inc.*, 2007 U.S. Dist. Lexis 28444 (D. Idaho Apr. 17, 2007) (noting that the Idaho statute applies to all contracts and denying enforcement of forum selection clause).

But more similar to the present dispute are numerous federal decisions invalidating forum selection clauses under state laws protecting local franchisees. For example, in *Jones v. GNC Franchising, Inc.*, 211 F.3d 495 (9th Cir. 2000), the Ninth Circuit held that a forum selection clause favoring Pennsylvania was void under California law. It found that the franchise statute rendering void forum selection clauses constituted a "strong public policy" and that the forum selection clause was therefore "unenforceable under the directives of *Bremen*." *Id.* at 498; *see also Solman Distribs., Inc. v. Brown-Forman Corp.*, 888 F.2d 170, 172 (1st Cir. 1989) (invalidating a forum selection clause based on Maine's franchise act, which prevents parties from waiving compliance with the act). Similarly, *E. & J. Gallo Winery v.*

Morand Bros. Bev. Co., 247 F. Supp. 2d 973 (N.D. Ill. 2002), rejected a forum selection clause because it is "clear that the Illinois Beer Act embodies Illinois' strong public policy in favor of having these issues litigated within its borders," and that "[a]llowing a privately contracted forum selection clause to supersede the Beer Act and its policies would frustrate the intention of the statute."

There is nothing remarkable about Costa Rica's Law 6209 having a similar effect on a forum selection clause as the Illinois Beer Act. Costa Rica is thus not alone in subordinating forum selection clauses to a substantive public policy – a policy so important that the Republic emphasized that rights could not be contractually waived. The price of doing business in any state or country is abiding by its laws. Nothing requires (or permits) the United States to forcibly deny Costa Rica the ability to apply its laws to companies that operate in its territory. American courts regularly put substantive policies ahead of such clauses as directed by the legislature. If the Eleventh Circuit had reached this issue, there would have been no reason for it not to have done the same. And such a holding would moot both questions raised in the Petition.

III. This Case Is a Poor Vehicle for Certiorari.

As the Eleventh Circuit vacated the anti-suit injunction on the threshold criteria, it did not address the balance of the test. And even if this Court were convinced that the Eleventh Circuit created a conflict in its *per curiam* opinion, this case is a poor vehicle for resolving the conflict because of the myriad alternative grounds for reversal of the district court. In other words, the ultimate judgment of the Eleventh Circuit would not differ, regardless of the resolution of the questions framed in the Petition. These grounds, combined with the complex statutory framework of evolving Costa Rican law, further render this case unsuitable for review.

The circuits have considered a variety of factors in deciding whether to grant foreign antisuit injunctions,

including whether the foreign proceeding seeks to interfere with the domestic action, whether strong public policies of the domestic jurisdiction would be threatened by the foreign proceeding, general equitable considerations, whether the foreign proceeding is vexatious or oppressive, and comity, among others. *See, e.g., Gallo*, 446 F.3d at 989-92; *Laker Airways*, 731 F.2d at 927-30.

1. Before reaching those matters, the Court would have to decide whether Canonlat carried its burden on the "same parties" prong of the threshold test. *See, e.g., Gallo*, 446 F.3d at 991 (recognizing that the threshold test asks "whether or not the parties and the issues are the same"). The district court erred below because the parties in both actions were not the same. SB Technology – which has no corporate relationship to either Canonlat or Lantech – was not a party to the domestic action. Nevertheless, the district court's injunction precluded Respondent from pursuing its claims against both Canonlat and SB Technology (which is jointly and severally liable with Canonlat under Costa Rican law) in Costa Rica.

2. The Costa Rican court did not interfere with any domestic proceeding. A foreign anti-suit injunction may sometimes be justified where necessary to protect the enjoining court's jurisdiction. *China Trade*, 837 F.2d at 36 ("[I]f a foreign court is not merely proceeding in parallel but is attempting to carve out exclusive jurisdiction over the action, an injunction may also be necessary to protect the enjoining court's jurisdiction."); *Quaak*, 361 F.3d at 14, 20. But the Costa Rican action does not threaten the jurisdiction of any American court because no injunction of the latter proceedings was sought or obtained. The Costa Rican court, in fact, exhibited great restraint notwithstanding its American counterpart's meddling in its affairs.

3. Nor does public policy support an injunction. *Laker Airways*, 731 F.2d at 931 ("Antisuit injunctions are also justified when necessary to prevent litigants' evasion of the

forum's important public policies."); *Gallo*, 446 F.3d at 991. As explained above, there is no conflict between this Court's general policy in favor of forum selection clauses and application of Costa Rican public policy. Federal courts frequently find that forum selections clauses are unenforceable when faced with statutory anti-waiver laws. The United States has no interest in allowing Canonlat to operate in Costa Rica without being subject to its laws. Public policy favors Costa Rica's sovereign interest in protecting its distributors from what it has determined are predatory practices.

4. Equitable considerations do not favor an injunction in this case. *See Quaak*, 361 F.3d at 22 (recognizing that just like "any other injunction," an "international antisuit injunction . . . is an equitable remedy designed to 'bring the scales into balance'"). Here, the district court did not issue an injunction until after two Costa Rican courts had already ruled that the forum selection clause was enforceable under Costa Rican law. Having exhausted appellate review in Costa Rica, Petitioner should not get a third bite at the apple in the United States. As described above, many jurisdictions in the United States place similar restrictions on the enforceability of forum selection clauses. If Costa Rica was so concerned about its distributors as to make protections for them unwaivable, why should that public policy choice be freely ignored? It would be inequitable, to say the least, to forcibly stop Costa Rica from enforcing its laws while continuing to uphold similar state laws.

5. To the extent that some courts have considered "vexatiousness" to be a factor in anti-suit injunctions, all of those courts have found that it is the *initiation* of the foreign lawsuit – with the purpose of interfering with the American case – that might be vexatious. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624 (5th Cir. 1996) ("Achilles's belated ploy of filing as putative plaintiff in Japan the very same claims against Kaepa that Kaepa had filed as plaintiff against Achilles

smacks of cynicism, harassment, and delay."); *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 10 F.3d 425 (7th Cir. 1993); *Gallo*, 446 F.3d at 985-89, 993, 995. Yet the only thing identified by the district court as "vexatious" was the application of Law 6209 to Canonlat in the form of the imposition of the bond. Pet. App. at 28a, 49a-50a. At the same time, Canonlat has never disputed the fact that the bond was properly imposed consistent with Costa Rican law. In fact, Article 9 of Law 6209 provides that the "foreign company must render a guarantee." If district court's interpretation of "vexatious" prevailed, then an anti-suit injunction would be appropriate whenever our laws differ from those of our neighbors. Following the district court's logic, foreign courts might issue anti-suit injunctions against American courts solely because of our discovery rules, or the possibility of punitive damages, both of which many foreign courts find distasteful.

6. In addition to the alternative grounds for reversal of the district court, this case arises from a complicated factual and statutory background. Not least of the complexities – which go unmentioned by Canonlat – is that Costa Rica recently ratified CAFTA. Annex 11.13 of that treaty requires Costa Rica to modify various parts of Law 6209, so that, among other things, the law "shall treat such contracts as establishing an exclusive relationship only if the contract explicitly states that the relationship is exclusive." Pet. App. at 25a. However, the implementing legislation preserves most of the statute and all claims that matured under the previous version of Law 6209.[5] It also grandfathers most existing relationships into the old regime. But this new legislation is not yet in force, and it is unclear whether any procedural aspects of the new laws will apply in the grandfathered cases or in cases (like Lantech's) which were

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5 The draft of the then-current implementing legislation was attached to Lantech's opening brief before the Eleventh Circuit at p. A-6 to A-12.

filed before the passage of CAFTA or before the implementing legislation took effect. Suffice to say that Costa Rican law is in flux, and the facts set forth in this case are not likely to recur.

IV. Lantech Respectfully Requests That This Court Rule on the Petition Before the End of the Term.

The Eleventh Circuit has stayed the mandate in this case until this Court's decision on certiorari. In a recent order, the Eleventh Circuit clarified that the now-vacated injunction remains enforceable until this Court resolves the Petition. The effect of the stay of the mandate is to jeopardize Lantech's case in Costa Rica because the Costa Rican court said last year (before vacatur of the injunction) that it would not permit any further delays in the case. In essence, Lantech is at risk – despite vacatur of the injunction – that it may suffer our equivalent of dismissal for failure to prosecute. For this reason, Lantech respectfully requests that this Court rule on the Petition before the close of the October 2007 Term.

CONCLUSION

For all of the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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